LEE GUAN PAR

v.

HOTEL UNIVERSAL SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: M-02-51-04]
28 APRIL 2005

CIVIL PROCEDURE: *Costs - Costs follow the event - Whether to be awarded to successful party - Whether a matter of discretion of court - Rules of High Court 1980, O. 59 r. 3(2)*

CIVIL PROCEDURE: *Interest - Tenancy Agreement - Breach of tenancy by tenant - Judgment - Pre-judgment interest - Whether allowable - Civil Law Act 1956, s. 11*

LANDLORD AND TENANT: *Rent - Action for - Non-payment of rent - Tenant continuing to be in occupation of premises - Whether a trespasser - Landlord - Whether entitled to double rental - Civil Law Act 1956, s. 28(4)(a)*

In 1988, SM, a firm in which the appellant was a partner, took a three-year tenancy from the respondent. Upon the expiry of the tenancy, the respondent gave notice to the appellant to deliver vacant possession of the premises on or before 31 July 1991. The appellant alleged that there was an oral agreement to extend the tenancy for another three years, and so refused to quit. While continuing to be in possession of the premises, the appellant, however, did not pay the rental thereof. Subsequently, three civil suits (and through them applications for interim orders) were filed by the parties, resulting in: (i) SM obtaining an injunction restraining the respondent from evicting it or determining the tenancy before 15 August 1994 ('1st suit'); (ii) the respondent obtaining an injunction restraining SM from remaining on the premises (respondent's application for vacant possession was later dismissed by the High Court/Supreme Court) ('2nd suit'); and (iii) the respondent obtaining a mareva injunction to the extent of RM800,000 ('3rd suit'). The facts further showed that the respondent had on 1 August 1991 entered the premises, but left the same on 20 August 1991, apparently on account of the injunctive order in the 1st suit aforesaid.

On 27 April 1994, the 1st, 2nd and 3rd suits were consolidated by the court, and on 15 August 1994 the appellant delivered vacant possession (still without paying the rental). On 12 December 2003, the High Court, having heard the consolidated suits: (i) dismissed the 1st and 2nd suits with costs; (ii) ordered, in respect of the 3rd suit, the appellant to pay single rental from 1 July 1991 to 14 August 1994 together with interest thereon at 8% per annum from 14 August 1994 to date of judgment with costs to be taxed (to be assessed by the registrar); (iii) ruled that the respondent's forceful entry of the premises from 1 August 1991 to 20 August 1991 was illegal, thereby entitling the appellant to damages (to be assessed by the registrar); and (iv) postponed the hearing of the mareva injunction to another date. Being dissatisfied, the appellant appealed against the learned judge's decisions on costs and interest, whilst the respondent cross-appealed on the finding of 'unlawful entry' and the order to pay damages thereon.

Held (dismissing the appeal; allowing the cross appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] The respondent was successful in obtaining judgment against the appellant in respect of its alternative claim for single rental from 1 July 1991 to 14 August 1994. Hence, the respondent was entitled to costs as costs would follow the event (Rules of the High Court 1980 O. 59 r. 3(2)). Costs, in any case, are in the discretion of the court. On the facts, the appellant had not shown any good reason or any ground whatsoever that the learned judge had misdirected himself on the question of costs. (pp 10 g, 11 c)

[2] There is no question that by virtue of s. 11 of the Civil Law Act 1956, (which confers the court discretion to award interest for period before judgment), interest at the rate of 8% as the learned judge thought fit to impose in this case would have to be paid on the judgment sum from 14 August 1994 until the date of judgment (12 December 2003). (p 11 e)

[3] There was no breach of the tenancy agreement by the respondent. Even if there was, the appellant had repudiated the same by failing or refusing to pay the rent from 1 July 1991 to 14 August 1994 thereby entitling the respondent to terminate the contract and sue the appellant for damages. (p 12 f)

[4] The respondent had obtained the mareva injunction on 23 May 1992 and it was the appellant who applied for further argument. Since the appellant had failed to pursue the application, the learned judge ought to have dismissed the same. Moreover, the mareva injunction had expired on the conclusion of the trial and ought, for that reason, to be discharged. (p 12 h)

[5] The learned judge, in holding the respondent's forceful entry of the premises as illegal, had overlooked the fact that he had held that SM, being a partnership, was not entitled in law to hold a tenancy, and further that, it was SM and the appellant who was in occupation of the premises during the period. Besides, the appellant did not pay the July 1991 rental. Thus, the learned judge had misdirected himself in not holding that since the appellant did not pay the rental, the appellant had repudiated the tenancy such as to result in the respondent's entry into the premises from 1 August 1991 to 20 August 1991 not being unlawful. It follows that the appellant's counterclaim for damages herein ought to have been dismissed with costs. (p 13 b-d)

[6] The substance of the respondent's claim was that the appellant had failed to pay rental from 1 July 1991 to 14 August 1994, whilst the appellant's case was that the respondent had granted an oral tenancy of three years beginning 15 August 1991 at a monthly rental of RM26,000. With the averments, the learned judge ought to have fixed the monthly rental at RM26,000, and not left it to the registrar to assess same. (p 13 e)

[7] The learned judge erred in law in not awarding double rental. The learned judge erred in failing to hold that since the appellant did not pay the rent for July 1991, the respondent was entitled to terminate the tenancy and re-enter the premises on 1 August 1991. Hence, when the appellant persisted in remaining in occupation of the premises from 1 August 1991 to 14 August 1994 without paying any rent for the period, he was in unlawful occupation thereof and was in law a trespasser which entitled the respondent to claim double rent under s. 28(4)(a), Civil Law Act 1956. (p 13 h)

[8] The trial court had misdirected itself on many occasions. This court must therefore interfere and order that the appellant pay RM22,500 as rental for the period 1 July 1991 to 14 August 1991, and a further sum of RM1,872,000 as damages for trespass for the period from 15 August 1991 to 14 August 1994 plus interest on the judgment sums at 8% per annum from 14 August 1994 to the date of judgment. (pp 10 e & 14 d)

[Appeal dismissed; cross appeal allowed; mareva injunction discharged forthwith; orders of High Court set aside]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pada tahun 1988, SM, sebuah firma di mana perayu merupakan seorang rakan kongsi, telah mengambil suatu tenansi dari responden untuk tempoh tiga tahun. Apabila tenansi tamat, responden memberi notis kepada perayu supaya mengosongkan premis pada atau sebelum 31 Julai 1991. Perayu mengatakan bahawa terdapat perjanjian lisan bagi melanjutkan tempoh sewaan selama tiga tahun lagi, dan dengan itu enggan berpindah. Sementara terus menduduki premis, perayu, bagaimanapun, tidak membayar sewanya. Berikutnya, tiga guaman sivil (dan melaluinya beberapa perintah interim) telah difailkan oleh pihak-pihak, berakibat: (ii) SM memperoleh injunksi menghalang responden dari menghalaunya atau menamatkan tenansi sebelum 15 Ogos 1994 ('guaman pertama'); (ii) responden mendapat injunksi melarang SM dari terus menduduki premis (permohonan responden untuk milikan kosong ditolak oleh Mahkamah Tinggi/Mahkamah Agong) ('guaman kedua'); dan (iii) responden mendapat injunksi mareva terhadap perayu setakat RM800,000. Fakta seterusnya menunjukkan bahawa pada 1 Ogos 1991 responden telah memasuki premis, tetapi terpaksa meninggalkannya pada 20 Ogos 1991, kelihatannya disebabkan oleh perintah injunksi guaman pertama di atas.

Pada 27 April 1994, guaman pertama, kedua dan ketiga telah disatukan oleh mahkamah, dan pada 15 Ogos 1994 perayu memulangkan milikan kosong (tanpa membayar sewa). Pada 12 Disember 2003, Mahkamah Tinggi, setelah mendengar guaman yang disatukan: (i) menolak guaman pertama dan kedua dengan kos; (ii) memerintahkan, berhubung guaman ketiga, perayu membayar sewa bulanan bermula 1 Julai 1991 hingga 14 Ogos 1994 beserta faedah pada kadar 8% setahun dari 14 Ogos 1994 hingga ke tarikh penghakiman dengan kos (ditaksir oleh pendaftar); (iii) memutuskan bahawa kemasukan responden secara paksa ke premis dari 1 Ogos 1991 hingga 20 Ogos 1991 sebagai tak sah sekaligus memberikan gantirugi kepada perayu (ditaksir oleh pendaftar); dan (iv) menangguh pendengaran injunksi mareva ke satu tarikh lain. Tidak berpuas hati, perayu merayu terhadap keputusan yang arif hakim berkaitan kos dan faedah, sementara responden merayu balas atas dapatan 'memasuki premis secara tak sah' dan perintah membayar gantirugi baginya.

Diputuskan (menolak rayuan; membenarkan rayuan balas)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Responden berjaya mendapat penghakiman terhadap perayu atas tuntutan alternatifnya untuk bayaran sewa bulanan dari 1 Julai 1991 hingga 14 Ogos 1994. Responden, dengan itu, berhak kepada kos kerana kos menyusuli peristiwa (Kaedah-Kaedah Mahkamah Tinggi 1980 A. 59 k. 3(2)). Selain itu, kos merupakan soal budibicara mahkamah. Berdasarkan fakta, perayu

gagal menunjukkan sebab munasabah, malah apa sebab sekalipun, yang menunjukkan bahawa yang arif hakim telah tersalah arah atas persoalan kos.

[2] Tidak diragukan bahawa berdasarkan s. 11 Akta Undang-Undang Sivil 1956 (yang memberi mahkamah budi bicara untuk mengaward faedah bagi tempoh sebelum penghakiman), faedah pada kadar 8% setahun seperti yang difikirkan layak untuk diberi oleh yang arif hakim di sini, sememangnya harus dibayar atas jumlah penghakiman dari 14 Ogos 1994 hingga ke tarikh penghakiman (12 Disember 2003).

[3] Tiada pelanggaran tenansi oleh responden di sini. Jikapun ada, perayu telah menolak perjanjian apabila gagal atau enggan membayar sewa dari 1 Julai 1991 hingga 14 Ogos 1994 sekaligus memberi hak kepada responden untuk menamatkan perjanjian dan mendakwa perayu untuk gantirugi.

[4] Responden telah mendapat injunksi mareva pada 23 Mei 1992 sementara perayu adalah orang yang memohon penghujahan lanjut baginya. Oleh kerana perayu gagal meneruskan permohonan, maka yang arif hakim sepatutnya menolak permohonan berkenaan. Lagipun, injunksi mareva telah luput ketika perbicaraan tamat, dan harus, atas alasan itu, digugurkan.

[5] Yang arif hakim, dalam memutuskan kemasukan secara paksa responden ke premis sebagai tak sah, gagal menimbang bahawa beliau telah mendapati bahawa SM, sebagai sebuah perkongsian, tidak berhak di sisi undang-undang untuk memegang tenansi, dan bahawa SM dan perayu adalah orang yang menduduki premis dalam tempoh tersebut. Selain itu, perayu tidak membayar sewa bagi bulan Julai 1991. Oleh itu, yang arif hakim telah tersalah arah akan dirinya apabila gagal memutuskan bahawa, oleh kerana perayu tidak membayar sewa, perayu sebenarnya telah menolak tenansi yang berakibat kemasukan responden ke dalam premis dari 1 Ogos 1991 hingga 20 Ogos 1991 tidak boleh dikatakan tak sah. Ianya mengikut bahawa tuntutan balas perayu untuk gantirugi harus ditolak dengan kos.

[6] Intisari tuntutan responden adalah bahawa perayu gagal membayar sewa dari 1 Julai 1991 hingga 14 Ogos 1994, sementara kes perayu adalah bahawa responden telah memberikan tenansi lanjutan selama tiga tahun bermula 15 Ogos 1991 pada kadar sewa RM26,000 sebulan. Atas pengataan ini, yang arif hakim seharusnya menetapkan sewa bulanan pada kadar RM26,000 sebulan, dan tidak menyerahkan kepada pendaftar untuk membuat taksiran.

[7] Yang arif hakim silap di sisi undang-undang apabila gagal mengaward sewa berganda. Yang arif hakim silap kerana tidak memutuskan bahawa, oleh kerana perayu gagal membayar sewa bagi bulan Julai 1991, responden berhak untuk menamatkan tenansi dan seterusnya memasuki semula premis pada 1 Ogos 1991. Oleh itu, apabila perayu berkeras untuk terus menduduki premis dari 1 Ogos 1991 hingga 14 Ogos 1994 tanpa membayar apa-apa sewa bagi tempoh itu, beliau tinggal disitu secara tak sah dan menjadi seorang penceroboh, sekaligus memberi hak kepada responden untuk menuntut sewa berganda di bawah s. 28(4)(a) Akta Undang-Undang Sivil 1956.

[8] Mahkamah bicara telah tersalah arah dalam banyak perkara. Dengan itu, mahkamah ini harus campur tangan dengan memerintahkan perayu membayar RM22,500 sebagai bayaran sewa bagi tempoh 1 Julai 1991 hingga 14 Ogos 1991, dan selanjutnya jumlah sebanyak RM1,872,000 sebagai gantirugi kerana ceroboh bagi tempoh 15 Ogos 1991 hingga 14 Ogos 1994 bersekali dengan faedah atas jumlah penghakiman pada kadar 8% setahun dari 14 Ogos 1994 hingga ke tarikh penghakiman.

Rayuan ditolak; rayuan balas dibenarkan; injunksi mareva digugur; perintah-perintah Mahkamah Tinggi diketepikan.]

Case(s) referred to:

Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co Ltd [1970] 1 QB 447 ***(refd)***

Lim Cheng Wah v. Ng Yaw Kim [1985] 2 MLJ 82 ***(refd)***

Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 ***(foll)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Wee Tiang Yap v. Chan Chan Brothers [1986] 1 MLJ 47 ***(foll)***

Legislation referred to:

Civil Law Act 1956, ss. 11, 28(4)(a)

Rules of the High Court 1980, O. 42 r. 12, O. 59 r. 3(2)

For the appellant - Hilary D'cruz (YS Leong with him); M/s San Leong

For the respondent - Manjit Singh (Philip Choong with him); M/s Philip Choong & Co

[Appeal from High Court, Melaka; Civil Suit No: 22-3-1996]

Reported by WA Sharif

JUDGMENT

Nik Hashim JCA:

The agreed facts are that *vide* an agreement dated 13 August 1988 (the tenancy agreement) the respondent agreed to let to the appellant the premises comprising of an 8-storey building for a term of two years commencing from 15 August 1988 to 14 August 1990 at a rental of RM129,000 per year (RM10,750 per month) payable in four quarterly payments. Pursuant to that agreement a deposit payment of RM43,000 was made to the respondent by the appellant.

By an undated letter the appellant purported to renew the tenancy for a period of one year at a monthly rental of RM10,750. An undated cheque was forwarded by the appellant to the respondent as payment of the deposit.

By a letter dated 13 April 1990, the respondent returned the said cheque and informed the appellant that he had failed to comply with cl. 7 of the tenancy agreement which requires a six months prior notice to exercise the option for renewal of the tenancy for another one year.

By a letter dated 20 July 1990 the respondent offered the appellant a tenancy for a further period of one year upon the terms and conditions therein contained. The appellant by a letter dated 5 September 1990 informed the respondent that he had not agreed to the said terms and conditions.

However, the appellant continued paying rental at quarterly intervals and the respondent kept on accepting the same until June 1991. By a letter dated 21 June 1991 the respondent through its solicitors gave notice to the appellant to quit and deliver vacant possession of the premises to the respondent on or before 31 July 1991.

By a letter dated 9 July 1991 the appellant forwarded a cheque for RM61,500 to the respondent being payment of rent as follows:

(i)	rent for the period 1 July 1991 to 31 July 1991	RM15,000
(ii)	rent for the period 1 August 1991 to 14 August 1991	RM7,500
(iii)	rent for the period 15 August 1991 to 31 August 1991	RM13,000
(iv)	rent for the period 1 September 1991 to 30 September 1991	RM26,000
	Total	RM61,500

The respondent, however, by a letter dated 11 July 1991, returned the said cheque to the appellant and informed the appellant that in view of the respondent's notice to quit dated 21 June 1991 the respondent would accept rental for the month of July 1991 only and requested the appellant to issue a cheque for the sum of RM15,000 being rental for the month of July 1991 only. The appellant did not respond nor did he pay the July rent as requested.

From 1 July 1991 to 14 August 1994 the appellant continued to be in possession of the said premises but failed or refused to pay any rent for the said period.

The above disputes had resulted in three suits between the parties, and they are:

(i) Kuala Lumpur High Court Civil Suit No. S1-22-328-91. This suit was transferred to the Muar High Court and registered as Muar High Court Suit No. 22-6-92 (the 1st suit).

(ii) Muar High Court Civil Suit No. 22-4-92 (the 2nd suit).

(iii) Muar High Court Civil Suit No. 22-8-92 (the 3rd suit).

The 1st suit was filed by Silver Merlin (SM), a partnership firm wherein the appellant was a partner, against the respondent and obtained the following reliefs:

(i) An injunction dated 31 July 1991 restraining the respondent from entering or evicting SM from the said premises.

(ii) Injunction dated 8 August 1991 restraining the respondent from remaining on the said premises and or interfering with or preventing SM, its agents from entering the said premises or to be within an area of 10 metres from the said premises or to determine the tenancy agreement between the respondent and SM for a period of three years from 15 August 1991 to 14 August 1994.

An application by the respondent to set aside the injunction orders was dismissed by the High Court but on appeal the Supreme Court allowed the injunctions to be set aside.

The 2nd suit was instituted by the respondent against SM. On 12 April 1992 the High Court allowed the respondent's application to restrain SM from, *inter alia*, entering and or remaining in the said premises. On appeal, the Supreme Court allowed the appeal and set aside the order. The respondent's application dated 26 May 1992 for an order that SM do forthwith quit and deliver vacant possession of the said premises was dismissed by the High Court on 7 June 1992. On appeal the dismissal was upheld by the Supreme Court.

The 3rd suit was filed by the respondent against the appellant. On 23 May 1992 the High Court allowed the respondent's application for a mareva injunction against the appellant to the extent of RM800,000. By a letter dated 25 May 1992 the solicitors for the appellants applied for further argument of the application of the respondent for a mareva injunction in open court, but later it was rejected by the High Court.

Meanwhile, on 27 April 1994 the High Court allowed the consolidation of the 3rd suit with the 1st and 2nd suit (the consolidated suits). By consent of the parties, the consolidated suits were ordered to be transferred to Melaka High Court by order of the High Court dated 24 August 1995 and registered as Melaka Civil Suit No. 22-3-96.

Vacant possession of the said premises was delivered to the respondent on 15 August 1994.

The trial in the consolidated suits was concluded on 12 December 2003. The learned judge dismissed the 1st and 2nd suits with costs. In respect of the 3rd suit the learned judge ordered the appellant to pay to the respondent single rental from 1 July 1991 to 14 August 1994 to be assessed by the Senior Assistant Registrar (SAR), together with interest thereon at 8% per annum from 14 August 1994 to the date of the judgment (12 December 2003) with costs to be taxed. The counterclaim of the appellant was allowed to the extent that the respondent pay the appellant damages for unlawful entry into the premises from 1 August 1991 to 20 August 1991 and ordered the same to be assessed by the SAR. The respondent was ordered to pay the appellant's cost of the counterclaim to be taxed. Finally the learned judge ordered that the respondent's application for a mareva injunction be postponed for further argument if the respondent was still desirous of proceeding with the mareva injunction.

Before us the appellant submitted on four issues, namely:

(i) that the costs should not have been awarded against the appellant as the learned judge had found that there was a tenancy in his favour until 14.8.1994.

(ii) that the appellant should not have been made to pay interest on the rental found to have been payable by him.

(iii) that the respondent should have been made liable for damages for breach of tenancy as the learned judge had found as a fact that the entry by force of the respondent was illegal.

(iv) that the mareva injunction obtained against the appellant should have been set aside by the judge and a consequential order for damages should have been made upon the undertaking given to the court.

At the conclusion of arguments by both the parties, we dismissed the appeal and counterclaim of the appellant with costs here and below and ordered that the deposit be paid towards the account of taxed costs. We further ordered that the orders of the High Court dated 12 December 2003 be set aside. We allowed the cross-appeal by the respondent and ordered the appellant to pay RM22,500 being rental for period from 1 July 1991 to 14 August 1991 and a further sum of RM1,872,000 as damages for trespass for period from 15 August 1991 to 14 August 1994 plus interest on the judgment sums at 8% per annum from 14 August 1994 to the date of the judgment. Lastly, the mareva injunction dated 23 May 1992, having expired on conclusion of the trial, was ordered to be discharged forthwith.

Findings

Costs

On the question of costs, it must be observed that the respondent was successful in obtaining judgment against the appellant in respect of its alternative claim for single rental from 1 July 1991 to 14 August 1994. Hence the respondent was entitled to costs as costs follow the event: O. 59 r. 3(2) of the Rules of High Court 1980 (RHC).

In *Petroliam Nasional Bhd (Petronas) & Anor v. Cheah Kam Chiew* [1987] 1 MLJ 25, Hashim Yeop A. Sani SCJ, in delivering the judgment of the Supreme Court at p. 26 C right said:

> The general principle envisaged in the rule is simply that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the Court that in the circumstances of the case some other order should be made …

His Lordship then continued:

> … an appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

It is important to note that costs are always in the discretion of the court. In the present case, the appellant had not shown any good reason or any ground whatsoever that the learned trial judge had misdirected himself on the law and or on the facts on the question of costs. Thus, the learned judge had exercised his discretion correctly in the circumstances of the case.

Interest

The learned judge in giving judgment in favour of the respondent on 12 December 2003 made an order that the appellant was to pay to the respondent single rental from 1 July 1991 to 14 August 1994 to be assessed by the SAR together with interest thereon at 8% per annum from 14 August 1994 to the date of the judgment. There is no question that by virtue of s. 11 of the Civil Law Act 1956 (Act 67) interest at the rate of 8%, as the learned judge thought fit to impose in this case, would have to be paid on that judgment sum from 14 Agust 1994 until the date of the judgment.

Unlike O. 42 r. 12 of the RHC which governs only the post-judgment interest, s. 11 of Act 67 provides for the pre-judgment interest. Section 11 clearly confers on the court a discretion to award interest on the amount for the period before judgment and the said section reads as follows:

> 11. In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section:

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

The basis on which the courts have acted in awarding interest under this section is that the defendant has kept the plaintiff out of the money which ought to have been paid to him and since the defendant has had the use of the money the defendant ought to compensate the plaintiff accordingly. In *Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co. Ltd* [1970] 1 QB 447, Lord Denning, at p. 468 said:

> An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.

See also *Lim Cheng Wah v. Ng Yaw Kim* [1985] 2 MLJ 82.

Thus, we see no reason why the learned judge, in exercise of his discretion, should not award interest. In accordance with the general principle that where discretion is given to a judge, the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground. In this case, the learned judge had exercised his discretion correctly.

Breach Of Tenancy Agreement

We agree with the respondent that there was no breach of tenancy agreement by the respondent. It was the contention of the respondent that there was no oral tenancy agreement between the parties and even if there was, the appellant had repudiated the same by failing or refusing to pay the rent from 1 July 1991 to 14 August 1994 thereby entitling the respondent to terminate the contract and sue the appellant for the damages.

Mareva Injunction

It is pertinent to note that the respondent had already obtained the mareva injunction on 23 May 1992 and it was the appellant who applied for further argument in open court in respect of the said injunction. Therefore, since the appellant had failed to pursue it at the trial the learned judge ought to have dismissed the said application. Moreover, the mareva injunction expired on the conclusion of the trial. Hence, we ordered it to be discharged forthwith.

Now we come to the respondent's cross-appeal.

Cross-Appeal

Appellant's Counterclaim

Respecting the appellant's counterclaim in the 3rd suit, the learned judge held that the respondent's forceful entry of the premises from 1 August 1991 to 20 August 1991 was illegal and thus entitling the appellant to damages. On this point, the learned judge overlooked the fact that he had held that SM, being a partnership, was not entitled in law to hold a tenancy and that it was SM and not the appellant who was in occupation of the premises during the said period.

Besides, it was not in dispute that the appellant did not pay the July 1991 rental to the respondent. As such, the learned judge misdirected himself in not holding that since the appellant did not pay the said rental, the appellant had repudiated the tenancy and hence the respondent's entry into the said premises from 1 August 1991 to 20 August 1991 was not unlawful and therefore the appellant's counterclaim for damages ought to have been dismissed with costs by the learned judge. In the event, we allowed the respondent's cross-appeal and dismissed the appellant's counterclaim.

Respondent's Claims

The substance of the respondent's claim against the appellant was that the appellant had failed to pay the rental for the premises from 1 July 1991 to 14 August 1994. On the other hand, the main trust of the appellant's case was that the respondent had granted the appellant an oral tenancy of three years from 15 August 1991 to 14 August 1994 at a monthly rental of RM26,000. In that event, the learned judge ought to have fixed the monthly rental of RM26,000 rather than left it to the SAR to assess the same.

In our judgment the learned judge was erroneous in failing to consider whether in the first place there was a concluded oral contract for a tenancy for a further three year term from 15 August 1991 to 14 August 1994 as alleged by the appellant and secondly, if there was such a concluded contract, whether the appellant had performed his obligation to pay the rental for the said period and conversely, whether the appellant had repudiated the said contract, if any.

Further, we agree with the respondent that the learned judge erred in failing to hold that since the appellant did not pay the rent for July 1991 he was in breach of contract and had repudiated the tenancy and accordingly the respondent was entitled in law to terminate the tenancy and re-enter the premises on 1 August 1991. Consequently, when the appellant persisted in remaining in occupation of the premises from 1 August 1991 to 14 August 1994 without paying any rent for the entire period, he was wilfully in unlawful occupation thereof and was in law a trespasser which entitled the respondent to claim double rent. Section 28(4)(a) of Act 67 provides:

> Every tenant holding over after the determining of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

See *Wee Tiang Yap v. Chan Chan Brothers* [1986] 1 MLJ 47 where a claim for double rent was awarded for trespass against the respondent who had wilfully remained on the premises after expiry of the tenancy.

Thus, the learned judge erred in law in not awarding double rental in the present case. He misdirected himself when he considered the hardship that the appellant would have to bear if double rental was ordered against the appellant. On this point, the learned judge ought to have decided the issue strictly on the facts and on the law and not on sentiment. His decision is therefore vulnerable to appellate interference.

It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, in the instant case, this court had a duty to interfere because the trial court had misdirected itself in many instances that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. (see *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545).

In the event we made the orders accordingly.